No. 20,112

In the United States Court of Appeals for the Ninth Circuit

CURTIS GALLERY & LIBRARY, a family partnership, H. T. CURTIS, SR., ARIETTE R. CURTIS, ELIZABETH CURTIS and H. T. CURTIS, JR., APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

On Appeal from the Judgment of the United States District Court for the Southern (Now Central) District of California

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BRIEF FOR THE APPELLEE

RICHARD C. PUGH,
Acting Assistant Attorney General

LEE A. JACKSON,
DAVID O. WALTER,
KARL SCHMEIDLER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

Of Counsel:

WILLIAM M. BYRNE, JR.,
United States Attorney.

LOYAL E. KEIR,
CHARLES H. MAGNUSON,
Assistant United States Attorneys.

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BRIEF FOR THE APPELLEE

OPINIONS BELOW

The District Court's memorandum of decision filed October 29, 1964 (I-R. 267-276), is reported at 241 F. Supp. 312. Its other memoranda of decision (I-R. 304-306, 343-344, 385-387, 392-393) are not officially reported.

JURISDICTION

This appeal involves federal income taxes and interest for the years 1944 through 1955 in the total

amount of $12,556.97. (I-R. 150, 153-154.) The taxpayers allege that on August 8, 1963, they paid $5,920.35 of taxes and interest. (I-R. 151-152.) The taxpayers filed a claim for refund on or about May 12, 1959. On May 25, 1962, more than six months after the claim was filed, no action having been taken by the Internal Revenue Service on the claim, the taxpayers brought an action in the District Court for the recovery of $4,131.57 allegedly overpaid plus interest and $150 of damages. (I-R. 2-55.) On August 23, 1963, the taxpayers filed an amended complaint in which they alleged that they were entitled to recover taxes allegedly overpaid during the years 1944 through 1955 plus interest on the overpayments in the total amount of $12,266.13, plus $140.84 of interest paid on deficiencies asserted by the Commissioner and $150 damages. (I-R. 149-174.) The taxpayers allege that the District Court had jurisdiction pursuant to 28 U.S.C., Section 1346(a), (b), and (c). Upon motions for summary judgment by the United States (I-R. 219-242), and by the taxpayers (I-R. 262-263), the District Court entered summary judgment on November 13, 1964 (I-R. 277-279), and its final judgment on March 16, 1966 (I-R. 394). The taxpayers filed a notice of appeal on January 11, 1965, from the November 13, 1964, judgment of the District Court. (I-R. 282.) The taxpayers allege that this Court has jurisdiction pursuant to 28 U.S.C., Section 1291.[1]

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[1] The taxpayers' appeal appears to be taken from a non-appealable order and, hence, is premature and should be dismissed. Under Rule 73(a) of the Federal Rules of Civil

Procedure an appeal is taken from the entry of judgment of the District Court (i.e., within 60 days in an action where the United States is a party). Rule 54(a) defines a judgment as a decree or order from which an appeal lies, and Rule 54(b) states that where there are multiple claims or multiple parties, a judgment which adjudicates fewer than all the claims and fewer than the claims of all the parties does not constitute a final judgment unless the District Court directs that his judgment shall be final as to some of the parties or some of the issues. In turn, Rule 58, as amended in 1963, provides for the entry of a judgment upon a decision by the District Court that a party shall recover only a sum certain or costs or that all relief shall be denied.

In the present case the taxpayers filed a notice of appeal (I-R. 282) from the entry of summary judgment (I-R. 277-279) on November 13, 1964. However, by its terms the summary judgment did not decide all of the issues in this proceeding but held only that the taxpayers were not entitled to any relief for years prior to 1955. Moreover, the District Judge explicitly expressed an intention that his summary judgment was not a final judgment when he included language in the judgment setting a hearing on November 16, 1964, "for the purpose of determining amounts due, if any, to H. T. Curtis, Sr., Ariette R. Curtis and Elizabeth J. Curtis" for 1955, and he did not direct that the summary judgment should constitute his final judgment either as to H. T. Curtis, Jr., or as to all issues, i.e., the taxpayers' claims for the year 1955 and subsequent years. Additionally, for one and one-half years after the entry of summary judgment the parties continued to litigate the amount of recoveries due them; the District Court held several hearings and issued four additional memoranda of decision. (I-R. 304-306, 343-344, 385-387, 392-393.) The District Court did not enter a judgment which resolved all of the issues relating to all of the taxpayers until March 16, 1966, when it finally issued its "Final Judgment". (I-R. 394.)

Under these circumstances it is clear that the entry of the summary judgment neither was intended to nor did it dispose of the proceedings in the District Court. Hence, the notice of appeal filed by the taxpayers from the entry of the No-

QUESTIONS PRESENTED

1. Are the taxpayers entitled to refunds of income taxes paid for the years 1944 through 1955 either under Section 1311 through 1314 of the Internal Revenue Code of 1954, or as a loss from theft under Section 165?

2. Are the taxpayers entitled to recover $150 in damages against the United States for the cost of hiring an enrolled representative to file their protest with the Internal Revenue Service?

STATUTES INVOLVED

The pertinent provisions of the Internal Revenue Code of 1954 are set forth in the Appendix, *infra.*

STATEMENT

The relevant facts as found by the District Court (I-R. 267-269) may be summarized as follows:

The taxpayers operated the Curtis Gallery & Library as a partnership from 1944 until its dissolution on December 31, 1956. From 1944 through 1955 the bookkeeper for the partnership, a Mr. Cusac, kept the partnership books and prepared the annual partnership tax returns. In January, 1956, Mr. Cusac, then over eighty years of age, retired. He has since passed away. Mr. Switzer took over his accounting. He ob-

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vember, 1964, judgment was prematurely filed under Rule 73; it is a nullity and should be dismissed. See 7 Moore's Federal Practice (1966 ed.), Section 73.09; 3 A Barron and Holtzoff, Federal Practice and Procedure (1958 ed.), Section 1553, p. 73.

tained extensions of time for filing the 1956 partnership return and the 1956 returns for the individual partners. On December 17, 1957, he suffered an incapacitating stroke without having filed the returns. (I-R. 267-268.)

Miss Lillian Castellano took over the books in January, 1958. The 1956 partnership return was finally filed on February 20, 1959. This return reflected a net loss of $42,718.22, which included $31,167.52 denominated as a "loss disclosed by audit". (I-R. 268.)

The Internal Revenue Service disallowed in its entirety the claimed deduction of $31,167.52. However, it allowed a net operating loss of $11,550.70 for 1956 which it allocated equally among the partners. The partners generally offset their allocable shares of the allowed net operating loss against other income for 1956 and carried the balance of the net operating loss to other years, giving rise to refunds for 1954 and 1956. The Service set off these refunds against deficiencies assessed by it against the taxpayers for the years 1958 and 1959. The excess amount of the deficiencies was paid by the taxpayers on August 8, 1963. The taxpayers exhausted their carry-overs in 1957. (I-R. 268.)

This proceeding was decided on motions for summary judgment filed by the Government (I-R. 219-242) and by the taxpayers (I-R. 262-263). Based upon statements alleged in support of the motions, the District Court found that the original partnership bookkeeper, in computing partnership net or taxable income for each of the years 1944 through 1955, had improperly treated funds withdrawn by Hunley Cur-

tis, Sr., from the partnership during those years. The District Court concluded that this resulted in an overstatement of the partnership income and, hence, each partner's distributive share for each of these years. (I-R. 268-269.)

The taxpayers filed an Application for Tentative Carryback Adjustment (Form 1045) on February 20, 1959, in which they requested refunds for each of the years 1953, 1954 and 1955. (I-R. 269.)

In its memorandum of decision on the motions for summary judgment the District Court held that the years 1944 through 1954 were closed by the statute of limitation, that the taxpayers failed to file timely claims for those years, and that the taxpayers were not entitled to any recovery for those years either as a theft loss or pursuant to Sections 1311 through 1314 of the 1954 Code. The District Court also held that the taxpayers were not entitled to any recovery for $150 in alleged damages. Finally, the District Court found that since H. T. Curtis, Jr., had no distributive share of partnership income in 1955, he was not entitled to any refund for that year. (I-R. 269-276.) Thereupon the District Court entered summary judgment on November 13, 1964, dismissing the taxpayers' claims for all years prior to 1955 and ordering a hearing to be held to determine what amounts, if any, were owing to the taxpayers for 1955. (I-R. 277-279.)

Subsequently, the District Court entered four additional memoranda of decision in this proceeding, as follows: On February 1, 1965, the Government contended that the taxpayers, H. T. Curtis, Sr., and Eliz-

abeth Curtis, had failed to file a timely claim for refund for 1955. (I-R. 286-288, 302-303.) In its memorandum of decision entered on March 1, 1965, the District Court denied the Government's motion and ordered a hearing to determine what amounts were due these taxpayers. (I-R. 304-306.) Pursuant to the Government's motion to reconsider its decision of March 1, 1965 (I-R. 308-311, 313-322), the District Court entered a memorandum of decision on November 30, 1965, determining a refund for 1955 due Elizabeth Curtis in the amount of $160.91, and due H. T. Curtis, Sr., in the amount of $395 (I-R. 343-344). The Government objected to the amount of the court's proposed judgment. (I-R. 345-357, 359-372.) On February 23, 1966, the District Court entered a memorandum of decision recomputing the refund for 1955 due Elizabeth Curtis as $80.46, and a refund for 1957 due H. T. Curtis, Sr., in the amount of $463.42. (I-R. 385-387.) On the basis of the Government's computation of the corrected tax liability of H. T. Curtis, Sr. (I-R. 388-391), the District Court on March 16, 1966, amended its prior decision, holding that it had previously erroneously computed the net operating loss carry-over from 1955 to 1957 for H. T. Curtis, Sr., and that his refund for 1957 should be $262.97. (I-R. 392-393.)

On March 16, 1966, the District Court entered its final judgment. (I-R. 394.) The taxpayers, however, previously had filed their notice of appeal on January 11, 1965, from the summary judgment entered by the District Court on November 13, 1964. (I-R. 282.) The United States filed a notice of appeal on May 13,

1966, from the final judgment of the District Court, from the allowance of any refund to Elizabeth Curtis for 1955.

SUMMARY OF ARGUMENT

I

Sections 1311 through 1313 of the 1954 Code provide that in certain specified circumstances the bar of the statute of limitations may be lifted to permit the Commissioner to assert a deficiency or a taxpayer to claim a refund for an otherwise closed year. This mitigation statute repesents an attempt by Congress to provide a relief measure both for the Commissioner and for taxpayers, but it also represents an attempt to protect the essential validity of the statute of limitations by confining the relief to certain well-defined situations. The statute provides that under specified circumstances where an error has been made in the inclusion or exclusion of an item of income or in the allowance or disallowance of a deduction or in the tax treatment of a transaction affecting the basis of property, the error may be corrected even though the ordinary period of limitations has run.

Section 1311(a) provides that if a "determination" as defined in Section 1313 has been made with respect to an error as described in Section 1312, the effect of the error shall be corrected by an adjustment made in the amount and manner specified in Section 1314, if, on the date of the determination, correction of the error is otherwise prevented by some law or rule of law, such as the statute of limitations.

A. Pertinent to this case, a "determination" is defined in Section 1313(a)(3)(B) as a final disposition by the Commissioner of a claim for refund. In the present case the taxpayers commenced this suit for refund in less than two years from the time the Commissioner disallowed their claims. Accordingly, there never has been any final disposition in this case and, hence, no determination.

Nevertheless, the District Court held that there was a determination because the Commissioner disallowed only part of the taxpayers' claims for 1956 and allowed part, and that a claim for refund was finally disposed of as to those items for which the claim was allowed. However, this provision does not apply to the circumstances of this case. Here, the item which was allowed by the Commissioner had no relation to any of the errors which the taxpayers allege to have occurred in the earlier, barred years. Thus, at most, there would be a final disposition only of an item which is not the subject matter of this proceeding.

Moreover, in holding that there was a determination, the District Court overlooked the fact that not all final dispositions of a refund claim constitute a determination. Section 1311(a) states that the determination must be one which is described in Section 1312. The items in Section 1312 refer to a determination which requires the double inclusion of an item of income or the double disallowance of a deduction. In the present case the Commissioner's disallowance of the $31,167.52 deduction item in 1956 did not relate to any double inclusion of the same item in gross incomes in 1956 and in the earlier, barred years and

it did not relate to any double disallowance of a deduction of the same item.

B. Also pertinent to this case, Section 1312 defines the various circumstances with respect to which an adjustment is authorized as a double inclusion of an item in gross income or the double disallowance of a deduction. In the present case the taxpayers overstated their distributive shares of partnership income for the years 1944 through 1955 and claimed a loss deduction in 1956 for the entire amount of their overstatements. Consequently, there was no double inclusion of the same item in gross incomes in the open year (1956) and in the earlier years (1944 through 1955). Likewise, the Commissioner has not disallowed the same deduction for 1956 which he erroneously had disallowed in the earlier years.

Without any explanation, the District Court held that there was a circumstance of adjustment in this case, i.e., a double disallowance of a deduction as set forth in Section 1312(4). However, the court below held that the taxpayers were not entitled to any recovery for any of the years 1944 through 1954, because Section 1311(b)(2)(B) requires that in the case of an adjustment relating to a double disallowance of a deduction, an adjustment may be made for a year only if a refund for that year was not barred when the taxpayer first maintained in writing that he was entitled to the deduction. We agree with the District Court that if the circumstance of adjustment as set forth in Section 1312(4) is present here, then at least all of the years 1944 through 1954 were closed before the taxpayers filed their claims for refund on

or about May 12, 1959. We also contend that the year 1955 similarly was closed since the claim for refund was filed after 1955 became barred to an adjustment. The District Court held, however, that the "in writing" requirement is not limited to a formal document, but includes an application for tentative carry-back adjustment, and that Elizabeth Curtis filed such an application on or about February 20, 1959, which would be timely for 1955. We have not found any authority to support this portion of the decision below. Moreover, it appears contrary to Section 1.1311 (b)-2(b) of the Treasury Regulations on Income Tax (1954 Code), which prescribes a formal assertion in writing, such as a statement in a return in a claim for refund, or in a petition before the Tax Court. It also appears contrary to Section 6411(a) of the 1954 Code, which states that an application for tentative carry-back adjustment does not constitute a claim for refund.

II

Initially, the taxpayers contended that the failure of their former bookkeeper for the partnership to account properly for withdrawals by H. T. Curtis, Sr., during 1944 through 1955 constituted a loss by theft which may be deducted in 1956, when the prior errors were discovered. However, there is nothing in the record to show that these overstatements of partnership income did not result from an honest mistake, and the taxpayers have not shown that their bookkeeper had overstated income with a fraudulent in-

tent to deprive them of their property or to appropriate partnership funds to his personal account.

III

The taxpayers also contend that they are entitled to $150 in damages against the United States because they were denied an independent conference by the Internal Revenue Service, and they were forced to spend $150 to hire an enrolled representative because the Service refused to allow their present bookkeeper (who was not enrolled to practice before the Service) to represent them in filing a protest.

An examination of the record shows that the taxpayers refused to attend the informal conference upon the mistaken impression that the conferee appointed for that meeting was not an independent conferee. The record also shows that the Service followed all of the procedures for such a conference as set forth in the published rulings, and the taxpayers have not shown that they sustained any resulting injury or loss.

Although the taxpayers' bookkeeper is an accountant, she was not enrolled to practice before the Treasury Department. The pertinent Regulations generally restrict practice before the Treasury Department to persons who are enrolled as qualified. This is a reasonable condition since the purpose of a protest proceeding is to discuss pending legal issues, and it generally is to the best interest of all parties to be represented by persons well-versed in tax law to determine whether the revenue agents had made errors of law.

There are, however, certain exceptions contained in these Regulations. For example, the taxpayers could have represented themselves, but they apparently did not desire to do so. They could have been represented by their bookkeeper if she was a full-time employee of the partnership, but this was not the fact. In any event, the taxpayers' bookkeeper was permitted to represent them prior to the filing of the protest, and she had the opportunity to furnish the revenue agents with all the pertinent information in her possession.

ARGUMENT

I. The Taxpayers Are Not Entitled to Any Refunds of Taxes for the Years 1941 Through 1955 Under Sections 1311 Through 1314 of the Internal Revenue Code of 1954

A. *Introduction to Sections 1311 through 1315*

Ordinarily, when the statute of limitations has run on the right of the Commissioner to assert a tax deficiency or on the right of a taxpayer to claim a refund for overpayment, correction of errors for the barred year is not permitted. However, Sections 1311 through 1314 of the 1954 Code (Appendix, *infra*) provide that under specified circumstances where an error has been made in the inclusion or exclusion of an item of gross income or in the allowance or disallowance of a deduction or in the tax treatment of a transaction affecting the basis of property, the error may be corrected even though the ordinary period of limitations has run.

In the present case there is no dispute but that the time for filing refund claims specified in Section 6511

(a) of the 1954 Code (Appendix, *infra*) had expired for the years 1944 through 1955 before the taxpayers filed their claims on or about May 12, 1959, for the years 1953, 1954 and 1955. Hence, the taxpayers are not entitled to any recovery in this proceeding if the mitigation provisions are not applicable to them.

Sections 1311 through 1314 are not designed to afford a general mitigation of the effect of the statute of limitations or to permit a general reopening of closed years. Instead, they are limited to certain well-defined and limited circumstances. Moreover, the party seeking the benefit of the statute is required to establish clearly the applicability of each of the specific requirements. *United States* v. *Rigdon*, 323 F. 2d 446, 449 (C.A. 9th); *Commissioner* v. *Goldstein's Estate*, 340 F. 2d 24, 27 (C.A. 2d); *Olin Mathieson Chemical Corp.* v. *United States*, 265 F. 2d 293, 296 (C.A. 7th); *Knowles Electronics, Inc.* v. *United States*, 365 F. 2d 43, 47-48, 49 (C.A. 7th); *Taxeraas* v. *United States*, 269 F. 2d 283, 289 (C.A. 8th); *Sherover* v. *United States*, 137 F. Supp. 778, 780 (S.D. N.Y.), affirmed *per curiam*, 229 F. 2d 766 (C.A. 2d). See 2 Mertens, Law of Federal Income Taxation (Rev.), Section 14.01.

Pertinent to the present case, Section 1311(a) provides that if a "determination", as defined in Section 1313, has been made for an open year with respect to an error described in Section 1312 for a barred year, the effect of the error for the closed year shall be corrected by an "adjustment" made in the amount and manner specified in Section 1314 if on the date of the determination correction of the error is other-

wise prevented by some law or rule of law, such as the statute of limitations. Section 1311(b)(2)(B) specifies as a necessary condition to the allowance of an adjustment involving the double disallowance of a deduction as described in Section 1312(4) that the year of adjustment must have been open for a credit or refund claim at the time the taxpayer claimed in writing that he was entitled to the deduction for the taxable year to which the determination relates. Section 1311(b)(1)(A) specifies that if a determination has been made with respect to other errors described in Section 1312, the Commissioner must have adopted in his determination for the open year a position which is inconsistent with the erroneous treatment of the item in the earlier year.

Also pertinent to this case, a "determination" is defined in Section 1313(a) in subparagraph (1) as "a decision by the Tax Court or a judgment, decree or other order by any court of competent jurisdiction, which has become final;" and in subparagraph (3) as "a final disposition by the Secretary or his delegate of a claim for refund". For this purpose a claim for refund is finally disposed of for items disallowed in whole or in part, "on expiration of the time for instituting suit with respect thereto (unless suit is instituted before the expiration of such time)".

The relevant facts in this case are not disputed. The taxpayers contend that they overstated their partnership net or taxable income for each of the years 1944 through 1955. They sought to compensate for these overstatements by claiming a loss deduction in their 1956 partnership return for the entire $31,-

167.52 of overstatements. The taxpayers filed claims for refund for the years 1953, 1954 and 1955 on or about May 12, 1959, in which they sought to carry back the alleged loss from 1956 to these earlier years. The taxpayers also filed an amended return for 1957 in which they sought to carry over part of the loss from the earlier years, and they filed amended returns and requests for refunds for 1958 and 1959 in which they sought to deduct the balance of the loss carry-over. The Commissioner disallowed their claims for refund for 1953, 1954 and 1955, as well as their applications for tentative carry-backs of losses to those years, on the ground that they were barred by the statute of limitations. The Commissioner also assessed deficiencies in income tax against the taxpayers for the years 1957, 1958 and 1959 resulting from the disallowance of the loss carry-forward. (I-R. 186, 213-215.)

In the proceeding for summary judgment in the court below the Government contended that the provisions mitigating the effect of the statute of limitations did not apply to the facts of this case, and that there were no circumstances of adjustment as defined in Section 1312 and no determination as defined in Section 1313. The District Court held that the denial of the taxpayers' claims for carry-back of the 1956 alleged loss was a "determination" within the meaning of Section 1313, and that there was a double disallowance of a deduction and, hence, a "circumstance of adjustment" within the meaning of Section 1312 (4). However, the District Court held that when the

taxpayers first claimed a deduction for 1956 the only year remaining open to adjustment under Section 1311(b)(2)(B) was 1955. On appeal the taxpayers contend that the District Court erred in disallowing any refunds attributable to years 1944 through 1954. The Government contends that the District Court correctly dismissed the taxpayers' claims for years prior to 1955, but that it erred in applying the mitigation provisions to 1955 and allowing a refund to Elizabeth Curtis for that year.[2]

B. *There has been no circumstance of adjustment as provided in Section 1312*

1. The taxpayers have not set forth clearly which of the circumstances of adjustment specified in Section 1312 applies to their situation, although they indicated below that the circumstances of adjustment set forth in Section 1312(1) is applicable here. That provision is as follows:

> (1) *Double inclusion of an item of gross income.*—The determination requires the inclusion in gross income of an item which was erroneously included in the gross income of the taxpayer for another taxable year or in the gross income of a related taxpayer.

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[2] The District Court also held that H. T. Curtis, Jr., was not entitled to a refund for 1955 since he had not received any income from the partnership for that year. (I-R. 270.) It does not appear that the taxpayers are questioning this determination on appeal. Moreover, the Government is not raising any issue on appeal concerning the carry-over of a loss by H. T. Curtis, Sr., to 1957.

The District Court correctly held (I-R. 274), that this provision by its own terms, does not apply. There was no double inclusion of an item in gross income both in the earlier years and in the later, open years. Instead, the facts show that the taxpayers erroneously included amounts in their gross incomes for the closed years which they sought to deduct in the open years. Thus neither the Commissioner's denial of a loss deduction for 1956 nor his denial of loss carryovers from 1955 to 1957, 1958 and 1959 required the taxpayers to include in their gross incomes for these open years the same item which had been erroneously included in their gross incomes for the years 1944 through 1955. Moreover, the provision in Section 1312(1) applicable to related taxpayers does not apply to the facts of the present case. Section 1312 (1) applies if the determination requires the inclusion of an item in the gross income of one taxpayer which had been erroneously included in the gross income of a related taxpayer for the same or another year. The taxpayers contend that they overstated their gross incomes for the years 1944 through 1955 by the amounts received by H. T. Curtis, Sr., during those years. However, as the District Court held (I-R. 274), the taxpayers have not shown that H. T. Curtis, Sr., erroneously included the withdrawals in his gross income for the years 1944 through 1955. Further, as shown, *supra*, there were never was any determination which required the other taxpayers to include the same item in their gross incomes which H. T. Curtis, Sr., had included in his income. Thus,

the circumstance of a double inclusion of an item in gross income does not apply in this case."

2. Instead, the District Court held (I-R. 273-274) that there was a circumstance of adjustment in the present case under Section 1312(4) relating to a double disallowance of a deduction. This provision is as follows:

> (4) *Double disallowance of a deduction or Credit.*—The determination disallows a deduction or credit which should have been allowed to, but was not allowed to, the taxpayer for another taxable year, or to a related taxpayer.

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[3] *United States* v. *Rachal*, 312 F. 2d 376 (C.A. 5th) is not relevant here. In that case the Commissioner had adjusted the value of the unit price of the taxpayer's inventory. The Fifth Circuit held that there was a double inclusion of an item in income for more than one year since a change in closing inventory for one year would affect opening inventory of the following year. Thus, the Fifth Circuit held that the change in valuation of the taxpayer's 1948 and 1949 inventory shifted income from those years to other years.

In *Rigdon* v. *United States*, 209 F. Supp. 267 (S.D. Calif.), reversed on other grounds, 323 F. 2d 446 (C.A. 9th), the District Court held that there was a double inclusion of an item of income where the Commissioner disallowed a deduction of rent paid by the parents to the guardian of their minor child, and the guardian had included the item of rent in the trust's income. This Court reversed on the ground that the parents and the guardian were not related taxpayers and did not discuss the question as to whether there had been a double inclusion of an item of income. In any event, we submit that the District Court erred in holding that this circumstance of adjustment should be construed very liberally to apply to the disallowance of any deduction which affects a taxpayer's gross income, and we have not found any support for the court's position.

We submit that the District Court erred in so holding.

If the taxpayers are contending that there was a disallowance of a deduction when the Commissioner disallowed the loss deduction for 1956 and a double disallowance when the Commissioner disallowed the loss carry-backs to 1953 through 1955, this would not meet the requirements of the statute. The disallowance of any loss carry-backs from 1956 resulted directly from the disallowance of the 1956 loss, and the Commissioner was not disallowing any deduction which should have been allowed to the taxpayers in other years.[4]

Moreover, there is no double disallowance of a deduction with respect to the years 1944 through 1955. Even if it is assumed that the amount claimed as a loss in 1956 should have been deducted from the taxpayers' distributive shares of partnership income during these earlier years, there has been no disallowance of a deduction in those earlier years which should have been allowed to the taxpayers. At most, there was a disallowed deduction in 1956 and wrongful inclusions in gross incomes in the years 1944 through 1955, a situation not covered by Section 1312(4).

Although most of the taxable years involved are governed by the Internal Revenue Code of 1939, the

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[4] The taxpayers cannot claim that there was a double disallowance of a deduction with respect to the years 1957, 1958 and 1959, since these latter years were not barred by the statute of limitations when the taxpayers filed their claims for refund, and Section 1312(4) does not apply to adjust open years.

applicable provisions of the 1939 and 1954 Codes are similar. The 1939 and 1954 Codes impose an annual income tax upon the net or taxable income of individuals. Net or taxable income is determined by subtracting allowable deductions from gross income. Allowable deductions may be taken only for the proper taxable year under the taxpayer's method of accounting. A taxpayer who keeps his books and reports his income upon the calendar year basis and on the cash receipts and disbursements method of accounting may deduct items of expense, including a reasonable allowance for salaries or other compensation for personal services actually rendered, only in the taxable year in which the payments are made. Likewise, the partnership, which kept its books and reported its income upon the calendar year basis and on the cash method of accounting, should have deducted the payments to H. T. Curtis, Sr., in each of the years in which payments were made to him.

The failure of the partnership to deduct the payments to H. T. Curtis, Sr., in each of the years 1944 through 1955 resulted in overstatements of the partnership net or taxable incomes for those years. However, a partnership is not subject to an annual income tax. Instead, each partner is required to include in his income his distributive share of the partnership net or taxable income. The net or taxable income of the partnership, with some exceptions not relevant here, is computed in the same manner as that of an individual. The failure of the partnership to deduct the payments to H. T. Curtis, Sr., in each of the

years 1944 through 1955 therefore caused each of the taxpayers to overstate his distributive portion of the partnership income. However, the failure of the taxpayers to reduce the partnership income by the amount of the payment to H. T. Curtis, Sr., and the failure of each taxpayer to make a corresponding reduction in his distributive share of partnership income, does not constitute a "deduction" within the meaning of the mitigation statute. *Knowles Electronics, Inc.* v. *United States*, 365 F. 2d 43 (C.A. 7th); *Brennen* v. *Commissioner*, 20 T.C. 495.[5]

3. Although the District Court held that there was a circumstance of adjustment under Section 1312(4), it concluded (I-R. 273) that it applied only to the year 1955. The application of a circumstance of adjustment in Section 1312 is limited by certain conditions which are set forth in Section 1311(b). Insofar

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[5] In *Brennen* there had been a determination allowing a deduction in one year and a claimed erroneous exclusion from gross income in another year. The Commissioner attempted to apply the mitigation provisions, claiming that there had been a double allowance of a deduction. The Tax Court disagreed, stating (20 T.C., p. 500):

> The taxpayer only claimed the deduction in a single year, 1944, and that was the year in which our determination allowed it. True, the amount of the deduction was a factor in adjusting the basis of the bonds for the purpose of determining the taxable gain on their sale in 1945, but that is a different matter from claiming "a deduction" in 1945.

Section 1312(5) refers to correlative inclusions in gross income and deductions from gross income as a circumstance of adjustment. However, this provision applies only to distributions by a trust or estate and is not applicable here.

as the circumstance of adjustment set forth in Section 1312(4) is concerned, Section 1311(b)(2)(B) contains the following conditions:

> (b) *Conditions Necessary for Adjustment.*—
>
> * * * *
>
> (2) *Correction not barred at time of erroneous action.*—
>
> * * * *
>
> (B) *Determination Described in Section 1312(4).*—In the case of a determination described in section 1312(4) (relating to disallowance of certain deductions and credits), adjustment shall be made under this part only if credit or refund of the overpayment attributable to the deduction or credit described in such section which should have been allowed to the taxpayer or related taxpayer was not barred, by any law or rule of law, at the time the taxpayer first maintained before the Secretary or his delegate or before the Tax Court of the United States, in writing, that he was entitled to such deduction or credit for the taxable year to which the determination relates.

This limitation was included in Section 1311(b) to prevent an indefinite postponement of the statute of limitations against deductions. For example, in the absence of this provision, if a taxpayer failed to take a deduction in the proper year and then claimed the deduction in a later, erroneous year when the earlier year had become barred by the statute of limitations,

the taxpayer by his own act could forever reopen the earlier year.

This problem was resolved by Section 1311(b)(2)(B), which permits an adjustment for the earlier year only if a credit or refund attributable to the deduction in that earlier year was not barred at the time the taxpayer first maintained in writing that he was entitled to the deduction in the later year. See Treasury Regulations on Income Tax (1954 Code), Section 1.1311(b)-2(b); 2 Mertens, Law of Federal Income Taxation (Rev.), Section 14.08a.

In the present case the District Court held (I-R. 273) that the taxpayers first maintained in writing on February 20, 1959, when they filed Applications for Tentative Carryback Adjustments for the years 1953, 1954 and 1955, that they were entitled to a deduction. However, all of the years 1944 through 1954 were already barred by the statute of limitations, so that the taxpayers were not entitled to any relief for those years under Section 1312(4). As the District Court held (I-R. 273)—

> If this were not so, the present statute of limitations would be entirely ineffective as a bar to *any* kind of mistake or oversight involving a deduction or credit on the part of a taxpayer where the taxpayer files a claim for refund. Int. Rev. Code 1954, §§ 1311-1315, were clearly not intended to achieve such an abrogation of the statute.

4. If Section 1312(4) applies to the circumstances of this case, which we deny, we agree with the holding of the District Court that it would not permit any

adjustment for the years 1944 through 1954. However, we disagree with the determination by the District Court (I-R. 304-306) that Elizabeth Curtis is entitled to adjust her income for 1955.

Elizabeth Curtis filed her claim for refund on or about May 12, 1959, which was more than three years after the filing of her return for 1955. The District Court held that her claim was timely filed for that year. Initially the court refers to Section 6511(d)(2)(A) (Appendix, *infra*), which provides a 39½-month period for filing a claim for refund attributable to a net operating loss carry-back in lieu of the normal three-year period applicable to other claims. However, the court appears to agree (I-R. 305) with the Government that her claim for refund for 1955 did not relate to an overpayment attributable to a net operating loss carry-back from 1956. Instead, any overpayment for 1955 resulted from a reduction in the 1955 taxable partnership income in the amount of $3,350.74, attributable to a withdrawal by H. T. Curtis, Sr., for that year, and from a reduction in her distributive share of partnership income from 100 percent to 50 percent. (I-R. 350, 354-355, 363-365, 371.) Accordingly, Section 6511(d)(2)(A) would not be applicable.

The District Court held (I-R. 305-306) that the "in writing" requirement of Section 1311(b)(2)(B) is not confined to a formal written claim for refund but is satisfied by other written claims, including the Application for Tentative Carryback Adjustment

filed by Elizabeth on or about February 20, 1959.[6] There does not appear to be any authority to support the District Court on this point. The Committee Reports do not discuss this requirement, and the authorities relied upon by the District Court do not appear to support his decision below. For example, Section 1.1311(b)-2(b) of the Treasury Regulations on Income Tax (1954 Code), cited by the court below (I-R. 306), in relevant part, is as follows:

> § 1.1311(b)-2 *Correction not barred at time of erroneous action.*
>
> * * * *
>
> (b) * * * The taxpayer will be considered to have first maintained in writing before the Commissioner or the Tax Court that he was entitled to such deduction or credit when he first *formally* asserts his right to such deduction or credit as, for example, in a return, in a claim for refund, or in a petition (or an amended petition) before the Tax Court. [Emphasis added.]

Moreover, Section 6411(a) of the 1954 Code (26 U.S.C. 1964 ed., Sec. 6411) provides that an application for a tentative carry-back adjustment shall not constitute a claim for refund.[7]

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[6] The claim for refund filed by Elizabeth Curtis on or about May 12, 1959, was not timely filed for 1955 under Section 1311(b)(2)(B).

[7] The taxpayers contended below that H. T. Curtis, Sr., is entitled to a greater net operating loss carry-over to 1957 than allowed by the District Court. The taxpayers calculated the net operating loss carry-over by reducing H. T. Curtis, Sr's., gross income for 1957 by his deductions and exemptions

C. *There was no "determination" within the meaning of Section 1313*

In relevant part Section 1313(a) of the 1954 Code defines the term "determination" to include the following:

> (a) *Determination.*—For purposes of this part, the term "determination" means—
>
> * * * *
>
> (3) a *final* disposition by the Secretary or his delegate of a claim for refund. For purposes of this part, a claim for refund shall be deemed finally disposed of by the Secretary or his delegate—
>
> * * * *
>
> (B) as to items with respect to which the claim was disallowed, in whole or in part, or as to items applied by the Secretary or his delegate in reduction of the refund or credit, on expiration of the time for instituting suit with respect thereto (unless suit is instituted before the expiration of such time); * * * [Emphasis added.]

Section 1313(a)(3)(B) of the 1954 Code and Section 1.1313(a)-3(c) of the Treasury Regulations on

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and then applying the net operating loss carry-over to this net amount. The District Court correctly held (I-R. 392-394), however, that whenever a net operating loss carry-over is involved the taxpayer's gross income for that year must be modified in accordance with Section 172 of the 1954 Code (Appendix, *infra*). Section 172(d) provides that no modifications may be made to a taxpayer's gross income for personal exemptions.

Income Tax (1954 Code) provide that a claim for refund which is disallowed becomes final and, hence, a "determination" only after expiration of the time for bringing a suit for refund, which, under Section 6532(a)(1) of the 1954 Code (26 U.S.C. 1964 ed., Sec. 6532), is two years from the date of mailing the notice of disallowance. In the present case there never was any final determination of the taxpayers' claim when they instituted the present suit prior to the expiration of the two-year period. This conclusion is similar to decisions holding that there has been no determination where a judgment of a court had not yet become final. See *Gill* v. *Commissioner*, 306 F. 2d 902 (C.A. 5th).

Even if there were a final disposition of the taxpayers' claims, which we deny, there is an additional reason why the Commissioner's denial of the taxpayers' claim for refund does not constitute a determination within the meaning of Section 1313(a). There is a close relation between the mitigation provisions. For example, Section 1312 defines the act which constitutes a determination, here the final disposition of a claim for refund. However, Section 1311(a) provides that the determination must be one which is described in Section 1312. All the items in Section 1312 refer to a determination which requires a circumstance of adjustment. For example, Section 1312(1) provides that the determination must require the double inclusion of an item of gross income, and Section 1312(4) provides that the determination must relate to a double dis-

allowance of a deduction. Thus, the mitigation provisions apply only to items involved in the determination which was the subject of the error. *Gill* v. *Commissioner*, 306 F. 2d 902, 906 (C.A. 5th); *First Nat. Bank of Phila.* v. *Commissioner*, 205 F. 2d 82, 85-86 (C.A. 3d); *Central Hanover Bank & Trust Co.* v. *United States*, 163 F. 2d 60 (C.A. 2d).

The Commissioner's disallowance of the taxpayers' claims for 1956 did not require any adjustment for other years. The ground upon which the claims were dismissed was that they were untimely filed, and this dismissal had nothing to do with the double inclusion of income for the years 1944 through 1955 or with the double disallowance of a deduction for one of the other years.

Nevertheless, the District Court held (I-R. 272) that there was a determination in this case because the service "disallowed only a portion of the claim *while allowing* a portion". This holding, however, fails to consider that the loss item allowed for 1956 and carried back to 1955 bore no relation to the loss item which was disallowed. The $11,550.70 net operating loss allowed for 1956 arose out of normal partnership operations for that year and was not even remotely connected with any overstatements of partnership income resulting from $31,167.52 of withdrawals by H. T. Curtis, Sr., during the years 1944 through 1955. The $11,550.70 loss was not related to any double inclusion of a same item in the partnership gross income for another year or to the double disallowance of a same item of deduction for

another year. Consequently, the allowance of the $11,550.70 loss as a deduction in 1956 was not the subject of the error by the taxpayers for which they are seeking the benefits of the mitigation provisions. *First Nat. Bank of Phila.* v. *Commissioner*, *supra.*

Thus, the District Court's reliance upon *United States* v. *Rachal*, 312 F. 2d 376, 379 (C.A. 5th), is misplaced. In *Rachal* the taxpayer filed claims for refund for 1948 and 1949 in which he contended that the Internal Revenue Service had overstated the unit cost and, hence, the valuation of his cattle inventories. As a result of these claims the Service re-examined the taxpayer's cattle inventories for the years 1948 through 1952, since any readjustment for the earlier years would affect the valuation of inventories in other years. The Service adjusted downward the value of the inventories and allowed part of the taxpayer's claims for 1948 and 1949. However it denied the balance of the claims for those years because payment was made within two years of filing the claims. The taxpayer then filed additional claims for this balance. The Fifth Circuit held that the entire claim for each year was based upon the inventory adjustments, and that allowance of part of each claim accepting the correctness of the readjusted inventories constituted a final disposition by the Commissioner of the claims. As we have pointed out, *supra*, the situation in the present case differs from that in *Rachal*, since there was no allowance of any part of the taxpayers' claims relating to the $31,-167.52, and the allowance of a net operating loss of

$11,550.70 for 1956 bears no relation to the error for which the taxpayers seek to apply the mitigation provisions.

II. The District Court Correctly Held That the Taxpayer Did Not Sustain Any Loss by Theft in 1956 Deductible Under Section 165 of the 1954 Code

The taxpayers initially contended (I-R. 2-55) that the statute of limitations is inapplicable to them on the ground that their bookkeeper erroneously had overstated partnership income during the years in which H. T. Curtis, Sr., had made capital withdrawals from the partnership and that such an erroneous treatment of income constituted a loss by theft deductible in the year in which it was discovered.

In computing taxable income a taxpayer is allowed a deduction for losses arising from theft. See Section 165(a) and (c)(3) of the 1954 Code (Appendix, *infra*). In contrast to losses arising from other causes, which are taxable in the year sustained, losses arising from theft are deductible in the year of their discovery. See Section 165(e) of the 1954 Code; 5 Mertens, Law of Federal Income Taxation (Rev.), Sections 28.48 and 28.59.

Whether a loss from theft has occurred depends upon the law of the jurisdiction in which the incident occurred. *Monteleone* v. *Commissioner*, 34 T.C. 688; *Morton* v. *Commissioner*, 40 T.C. 500; 5 Mertens, Law of Federal Income Taxation, *supra*, Section 28.59. In the present case there is no evidence that the overstatements of partnership income were not caused by an honest mistake. The taxpayers have not contended

that their bookkeeper had overstated partnership income with a fraudulent intent to appropriate partnership funds to his personal account, that he had appropriated to his own use any property or money belonging to the partnership or to an individual partner, or that he had intended to defraud the partnership or any partner of property or money belonging to them. Accordingly, the necessary elements of theft as defined in Section 484 of the Penal Code, 48 West's Annotated California Codes,[8] are not present in this case.[9]

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[8] Penal Code, 48 West's Annotated California Codes:

Sec. 484. *Theft defined*

Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft. * * *

[9] The taxpayers made several other contentions in the District Court, all of which the District Court correctly dismissed.

Elizabeth Curtis contended that she is entitled to an exemption for her mother in 1955. The District Court correctly dismissed this portion of her claim as follows (I-R. 385):

By defendant's memorandum of February 2, 1966, plaintiff Elizabeth J. Curtis was put on notice that she was to produce evidence supporting her claim that in 1955 she contributed sufficiently to her mother's support to

III. The District Court Correctly Held That the Taxpayers Were Not Entitled to Recovery of Damages Against the United States

The taxpayers seek $150 in damages against the United States apparently upon two grounds: (1) They were denied an independent informal conference by the Internal Revenue Service, and (2) they were forced to spend $150 to hire an enrolled representative because the Service refused to allow their present bookkeeper to represent them in filing a protest. The District Court correctly held against the taxpayers on both grounds.

In November, 1960 the taxpayers declined to accept adjustments proposed to their tax liabilities by Internal Revenue Agents and requested "a discussion at the conference board level". (I-R. 45-46, 47.) The Service then asked the taxpayers whether they desired an informal conference and, if so, with a "conferee who functions independently of the examining officer's group supervisor". (I-R. 48-51.) The taxpayers requested such a conference. (I-R. 52.) In January, 1961, the taxpayers were notified by John

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claim her as a dependent. At the hearing of February 7, 1966, she produced no evidence. The taxpayer must support her claim. See *Burnet* v. *Houston*, 283 U.S. 223, 228 (1931).

The taxpayers also contended below that they overpaid interest on tax deficiencies for 1957, 1958, and 1959, on the ground that they failed to receive any credit for interest accruing to them on their claimed overpayments. The District Court correctly dismissed this contention on the ground (I-R. 275) that the court lacked jurisdiction of this matter under Section 7422(a) of the 1954 Code since the taxpayers had not filed any claims for refund for these years.

F. Hauner that he had been "assigned to act as an independent conferee", and he proposed a time for the conference. This letter was signed "John F. Hauner, Group-Supervisor-Conferee". (I-R. 53.) The taxpayers declined to attend the conference in which Mr. Hauner would be the independent conferee. (I-R. 53.)

The taxpayer's contention that they were denied an independent informal conference apparently is based upon their mistaken impression that Mr. Hauner was the Group Supervisor of the Internal Revenue Agents assigned to their case. Instead, as Mr. Hauner's affidavit points out (I-R. 240-241), all of the Internal Revenue Agents assigned to the Pasadena office of the Service were assigned to one of two field audit groups, and the Internal Revenue Agents involved in this matter were not assigned to Mr. Hauner but to the other group.

The primary purpose for an informal conference is to discuss questions of law and not of fact. In the present case the revenue agents had obtained the relevant facts fom the taxpayers' bookkeeper. It is desirable that an independent conferee be knowledgeable of the legal issues, and the taxpayers have not questioned Mr. Hauner's ability. Further, there is nothing in the record which showed that he could not function as an independent conferee in this case, since his group was not charged with it. Rev. Proc. 56-34, 1956-2 Cum. Bull. 1396; Rev. Proc. 60-16, 1960-2 Cum. Bull. 940; Rev. Proc. 60-24, 1960-2 Cum. Bull. 998. In any event, the taxpayers have not shown that they sustained an injury or loss of property

from the appointment of Mr. Hauner, as required by 28 U.S.C., Section 1346(b).

With respect to the second contention raised by the taxpayers, the Service refused to allow Mrs. Castellano to represent the taxpayers in filing their protest. Although she was an accountant, she was not enrolled to practice before the Treasury, and the taxpayers paid an enrolled accountant $150 to file the protest prepared by Mrs. Castellano. (I-R. 187, 215.)

Pursuant to his authority to prescribe rules and Regulations governing the representation of claimants before the Treasury Department, the Secretary of the Treasury has promulgated Regulations on Practice of Attorneys and Agents Before the Treasury Department (31 C.F.R., Part 10). Section 10.2 (a) of these Regulations provides generally "no person shall be recognized or permitted to practice before the Internal Revenue Service unless he is enrolled as an attorney or agent * * *." Sec. 10.2(b) defines the term "practice" to include the "preparation and filing of necessary documents, correspondence with and communications to the Internal Revenue Service, and the representation of a client at conferences, hearings, and meetings", but does not include "the preparation of tax returns * * * [or] nor the furnishing of information at the request of the Internal Revenue Service * * *."

However, certain individuals are entitled to practice without enrollment. Under Section 10.7(a) an individual may represent himself, and under Section 10.7(a)(1) an individual "may represent a partnership of which he is a member or a regular full-time

employee * * *." Under Section 10.7(a)(7) (effective March 15, 1959), any person who signs an individual income tax return as having prepared it for the taxpayer may appear without enrollment "before revenue agents and examining officers of the Audit Division in the offices of District Directors (but not at the Informal Conference in a District Director's office) with respect to the tax liability of the taxpayer for the taxable year or period covered by that return * * *." If the taxpayer desires to file a protest, this must be "executed by the taxpayer and presented by the taxpayer or through his enrolled representative". Rev. Proc. 59-3, 1959-1 Cum. Bull. 801, 803.

The taxpayers contend that Mrs. Castellano was qualified to file the protest because she was a full-time employee of the partnership. This contention is contrary to the undisputed facts, which show that the partnership was dissolved on December 31, 1956, and Mrs. Castellano was not asked to assume control over the partnership books and records until January, 1958. (I-R. 180, 181, 207, 209.)

Thus, the District Court correctly held (I-R. 274-275) that the taxpayers had failed to present to the Service a proper power of attorney for Mrs. Castellano, and the Government was not unreasonable in taking this position. Indeed, as noted *supra*, the purpose of informal conferences and protest proceedings is to accord taxpayers the opportunity to discuss the legal issues involved, and it is to the best interest of all parties to the conference that they be presented by persons well versed in tax law to determine whether the revenue agents had made errors of law. The

taxpayers have not shown that Mrs. Castellano qualifies for this purpose. In any event, she had been permitted to represent the taxpayers prior to the filing of their protest, so that she could have furnished the revenue agents with all the relevant information in her possession.

CONCLUSION

For these reasons, the judgment of the District Court should be affirmed in all respects, except for the allowance of a refund to Elizabeth Curtis for 1955, as to which the judgment should be reversed.

Respectfully submitted,

RICHARD C. PUGH,
Acting Assistant Attorney General.

LEE A. JACKSON,
DAVID O. WALTER,
KARL SCHMEIDLER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

Of Counsel:

WILLIAM M. BYRNE, JR.,
United States Attorney.

LOYAL E. KEIR,
CHARLES H. MAGNUSON,
Assistant United States Attorneys.

APRIL, 1967.

Certificate

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: 14th day of April, 1967.

/s/ Karl Schmeidler
Attorney.

APPENDIX

Internal Revenue Code of 1954:

SEC. 165. LOSSES.

(a) *General Rule.*—There shall be allowed as a deduction any loss sustained during the taxable year and not compensated for by insurance or otherwise.

* * * *

(c) *Limitation on Losses of Individuals.*—In the case of an individual, the deduction under subsection (a) shall be limited to—

* * * *

(3) losses of property not connected with a trade or business, if such losses arise from fire, storm, shipwreck, or other casualty, or from theft. * * *

* * * *

(e) *Theft Losses.*—For purposes of subsection (a), any lose arising from theft shall be treated as sustained during the taxable year in which the taxpayer discovers such loss.

* * * *

(26 U.S.C. 1964 ed., Sec. 165.)

SEC. 172. NET OPERATING LOSS DEDUCTION.

* * * *

(c) *Net Operating Loss Defined.*—For purposes of this section, the term "net operating loss" means (for any taxable year ending after December 31, 1953) the excess of the deductions allowed by this chapter over the gross income. Such excess shall be computed with the modifications specified in subsection (d).

(d) *Modifications.*—The modifications referred to in this section are as follows:

* * * *

(3) *Deductions for personal exemptions.*—No deduction shall be allowed under section 151 (relating to personal exemptions). No deduction in lieu of any such deduction shall be allowed.

* * * *

(26 U.S.C. 1964 ed., Sec. 172.)

SEC. 1311. CORRECTION OF ERROR.

(a) *General Rule.*—If a determination (as defined in section 1313) is described in one or more of the paragraphs of section 1312 and, on the date of the determination, correction of the effect of the error referred to in the applicable paragraph of section 1312 is prevented by the operation of any law or rule of law, other than this part and other than section 7122 (relating to compromises), then the effect of the error shall be corrected by an adjustment made in the amount and in the manner specified in section 1314.

(b) *Conditions Necessary for Adjustment.*—

(1) *Maintenance of an inconsistent position.*—Except in cases described in paragraphs (3) (B) and (4) of section 1312, an adjustment shall be made under this part only if—

(A) in case the amount of the adjustment would be credited or refunded in the same manner as an overpayment under section 1314, there is adopted in

the determination a position maintained by the Secretary or his delegate, or

(B) in case the amount of the adjustment would be assessed and collected in the same manner as a deficiency under section 1314, there is adopted in the determination a position maintained by the taxpayer with respect to whom the determination is made,

and the position maintained by the Secretary or his delegate in the case described in subparagraph (A) or maintained by the taxpayer in the case described in subparagraph (B) is inconsistent with the erroneous inclusion, exclusion, omission, allowance, disallowance, recognition, or nonrecognition, as the case may be.

(2) *Correction not barred at time of erroneous action.*—

* * * *

(B) *Determination Described in Section 1312 (4).*—In the case of a determination described in section 1312 (4) (relating to disallowance of certain deductions and credits), adjustment shall be made under this part only if credit or refund of the overpayment attributable to the deduction or credit described in such section which should have been allowed to the taxpayer or related taxpayer was not barred, by any law or rule of law, at the time the taxpayer first maintained before the Secretary or his delegate or before the Tax Court

of the United States, in writing, that he was entitled to such deduction or credit for the taxable year to which the determination relates.

* * * *

(26 U.S.C. 1964 ed., Sec. 1311.)

SEC. 1312. CIRCUMSTANCES OF ADJUSTMENT.

The circumstances under which the adjustment provided in section 1311 is authorized are as follows:

(1) *Double Inclusion of an Item of Gross Income.*—The determination requires the inclusion in gross income of an item which was erroneously included in the gross income of the taxpayer for another taxable year or in the gross income of a related taxpayer.

* * * *

(4) *Double Disallowance of a Deduction or Credit.*—The determination disallows a deduction or credit which should have been allowed to, but was not allowed to, the taxpayer for another taxable year, or to a related taxpayer.

* * * *

(26 U.S.C. 1964 ed., Sec. 1312.)

SEC. 1313. DEFINITIONS.

(a) *Determination.* — For purposes of this part, the term "determination" means—

* * * *

(3) a final disposition by the Secretary or his delegate of a claim for refund. For purposes of this part, a claim for refund

shall be deemed finally disposed of by the Secretary or his delegate—

* * * *

(b) *Taxpayer.*—Notwithstanding section 7701 (a)(14), the term "taxpayer" means any person subject to a tax under the applicable revenue law.

* * * *

(26 U.S.C. 1964 ed., Sec. 1313.)

SEC. 1314 AMOUNT AND METHOD OF ADJUSTMENT.

* * * *

(b) *Method of Adjustment.*—The adjustment authorized in section 1311(a) shall be made by assessing and collecting or refunding or crediting, the amount thereof in the same manner as if it were a deficiency determined by the Secretary or his delegate with respect to the taxpayer as to whom the error was made or an overpayment claimed by such taxpayer, as the case may be, for the taxable year or years with respect to which an amount is ascertained under subsection (a), and as if on the date of the determination one year remained before the expiration of the periods of limitation upon assessment or filing claim for refund for such taxable year or years. If, as a result of a determination described in section 1313(a)(4), an adjustment has been made by the assessment and collection of a deficiency or the refund or credit of an overpayment, and subsequently such determination is altered or revoked, the amount of the adjustment ascertained under subsection (a) of this section shall be redetermined on the basis

of such alteration or revocation and any overpayment or deficiency resulting from such redetermination shall be refunded or credited, or assessed and collected, as the case may be, as an adjustment under this part. In the case of an adjustment resulting from an increase or decrease in a net operating loss which is carried back to the year of adjustment, interest shall not be collected or paid for any period prior to the close of the taxable year in which the net operating loss arises.

* * * *

(26 U.S.C. 1964 ed., Sec. 1314.)

SEC. 6511. LIMITATIONS ON CREDIT OR REFUND.

(a) [as amended by Sec. 82(a), Technical Amendments Act of 1958, P.L. 85-866, 72 Stat. 1606] *Period for Filing Claim.*—Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. * * *

(b) *Limitation on Allowance of Credits and Refunds.*—

(1) *Filing of claim within prescribed period.*—No credit or refund shall be allowed or made after the expiration of the period of limitation prescribed in subsection (a) for the filing of a claim for credit or re-

fund, unless a claim for credit or refund is filed by the taxpayer within such period.

* * * *

(d) *Special Rules Applicable to Income Taxes.*—

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(2) *Special period of limitation with respect to net operating loss carrybacks.*—

(A) [as amended by Sec. 317(d), Trade Expansion Act of 1962, P.L. 87-794, 76 Stat. 872] *Period of Limitation.*—If the claim for credit or refund relates to an overpayment attributable to a net operating loss carryback, in lieu of the 3-year period of limitation prescribed in subsection (a), the period shall be that period which ends with the expiration of the 15th day of the 40th month (or the 39th month, in the case of a corporation) following the end of the taxable year of the net operating loss which results in such carryback, or the period prescribed in subsection (c) in respect of such taxable year, whichever expires later; * * *

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(26 U.S.C. 1964 ed., Sec. 6511.)

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